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No. 15-423

IN THE
Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

JOSEPH D. PIZZURRO
ROBERT B. GARCÍA
KEVIN A. MEEHAN
JUAN O. PERLA
CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178

BRUCE D. OAKLEY
Counsel of Record
HOGAN LOVELLS US LLP
700 Louisiana Street
Suite 4300
Houston, TX 77002
(713) 632-1400
bruce.oakley@hoganlovells.com

WILLIAM L. MONTS, III
CATHERINE E. STETSON
MARY HELEN WIMBERLY
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

The Foreign Sovereign Immunities Act (FSIA) provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Under the Act's expropriation exception, in pertinent part, "[a] foreign state shall not be immune *** in any case *** in which rights in property taken in violation of international law are in issue." *Id.* § 1605(a)(3).

The question presented is: What standard should courts use to determine whether a complaint's allegations that "rights in property taken in violation of international law are in issue" are legally sufficient to confer jurisdiction under the FSIA's expropriation exception?

PARTIES TO THE PROCEEDINGS

1. Bolivarian Republic of Venezuela, Petróleos de Venezuela, S.A., and PDVSA Petróleo, S.A., petitioners on review, were defendants-appellants and cross-appellees below.

2. Helmerich & Payne International Drilling Co., respondent on review, was plaintiff-appellee below. Helmerich & Payne de Venezuela, C.A., respondent on review, was plaintiff-appellee and cross-appellant below.

RULE 29.6 DISCLOSURE STATEMENT

Bolivarian Republic of Venezuela is a sovereign state and is not a corporation.

Petróleos de Venezuela, S.A., is a corporation organized and existing under the laws of Venezuela. It is wholly owned by the Bolivarian Republic of Venezuela. It has no parent corporation, and no publicly held company owns ten percent or more of its stock.

PDVSA Petróleo, S.A., is a corporation organized and existing under the laws of Venezuela. Petróleos de Venezuela, S.A. owns all of the outstanding stock of PDVSA Petróleo, S.A., and no publicly held company owns ten percent or more of its stock.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The court of appeals' decision is reported at 784 F.3d 804 and reproduced in the joint appendix at J.A. 170-199. The district court's decision is reported at 971 F. Supp. 2d 49 and reproduced at J.A. 124-169.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2015, and a timely petition for panel rehearing and rehearing en banc was denied on July 30, 2015. Pet. App. 95a-98a. A timely petition for certiorari was filed on October 5, 2015 and granted on June 28, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The expropriation exception of the Foreign Sovereign Immunities Act of 1976 (FSIA) provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> * * *
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States
> * * * [28 U.S.C. § 1605(a)(3).]

The entire FSIA, as amended, *id.* §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611, the federal-question statute, *id.* § 1331, and portions of the diversity statute, *id.* § 1332, are reproduced in the addendum to this brief.

INTRODUCTION

Jurisdictional analysis under the FSIA begins with the presumption of immunity. Foreign states "shall be immune from the jurisdiction of" U.S. courts, unless one of the carefully delineated statutory exceptions to immunity applies. 28 U.S.C. § 1604; *see id.* §§ 1605-1607 These exceptions are narrow; under the statutory regime, "[a] foreign state is normally

immune." *Verlinden B.V* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) (*Verlinden*).

The FSIA exception at issue in this case, the expropriation exception, is no different. It abrogates sovereign immunity only when "rights in property taken in violation of international law *are* in issue." 28 U.S.C. § 1605(a)(3) (emphasis added). The text does not say that jurisdiction exists whenever the specified rights are "non-frivolously alleged to be" in issue. The expropriation exception is limited to circumstances where the complaint alleges rights that *actually are* legally recognized "rights in property," and a taking that *actually is* a "violation of international law." *Id.*

This Court's precedents allow nothing less. When interpreting the FSIA's exceptions, this Court consistently has applied a single standard: a complaint must plead facts that, if accepted as true, establish all of the elements of the relevant exception. Even when there is overlap between a jurisdictional requirement and an issue related to the plaintiff's cause of action, the standard is the same. A "court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act." *Verlinden*, 461 U.S. at 493-494.

The court below declined to decide whether the complaint actually identified legally recognized rights in property, taken in a manner that violates international law. Because the plaintiffs' cause of action parroted the statutory language of the expropriation exception, the court concluded that there was an overlap between jurisdictional issues and merits issues. Therefore, it held that the standard

for pleading federal-question jurisdiction under 28 U.S.C. § 1331, as set forth in *Bell* v. *Hood*, 327 U.S. 678 (1946), should apply. According to the court of appeals, the complaint could be dismissed for lack of jurisdiction only if the plaintiffs' allegations of "rights in property taken in violation of international law," 28 U.S.C. § 1605(a)(3), were "'wholly insubstantial or frivolous,'" J.A. 178 (citation omitted).

The *Bell* pleading standard should not apply to the expropriation exception. *Bell* adopted the frivolousness standard as an interpretation of 28 U.S.C. § 1331, a statute enacted to establish the appropriate boundary between cases that may be brought in federal court and cases that should instead be litigated in state court. Given that historical purpose, it makes good sense that all the statute requires to confer federal jurisdiction is the pleading of a non-frivolous federal question.

The FSIA is different. It controls whether a foreign state is subject to suit *anywhere* in the United States for the dispute in question. If not, the foreign state is immune from the jurisdiction of *all* U.S. courts for that dispute. *Id.* § 1604. And unlike the federal-question statute, which requires only that a case "aris[e] under" federal law, *id.* § 1331, the FSIA contains "detailed federal law standards" that "comprehensively regulat[e] the amenability of foreign nations to suit in the United States," *Verlinden*, 461 U.S. at 493-494. A judicial standard that requires that a plaintiff plead only non-frivolous allegations to overcome the jurisdictional hurdle is, at best, a passing nod to general principles—not an application of detailed standards. Accordingly, the same analysis that this Court has always applied to the FSIA's exceptions should also apply to the expropriation ex-

ception: courts should determine whether the plaintiff has *actually* pleaded a taking of rights in property in violation of international law.

STATEMENT

A. Factual Background

The plaintiffs in this lawsuit are Helmerich & Payne International Drilling Co. (H&P-IDC), an American corporation, and its wholly owned subsidiary Helmerich & Payne de Venezuela, C.A. (H&P-V), a Venezuelan corporation (collectively, the H&P plaintiffs). J.A. 56-57 (¶¶ 9-10). The defendants are the Bolivarian Republic of Venezuela (the Republic), Petróleos de Venezuela, S.A. (PDVSA), and PDVSA Petróleo, S.A. (Petróleo) (collectively, Venezuela or defendants). J.A. 57-59 (¶¶ 11-13).

H&P-V has been in the oil-drilling business in Venezuela since 1954 and began performing drilling services for PDVSA and Petróleo in the 1970s. J.A. 59 (¶ 16). It continued to do so until the relationship deteriorated six years ago. J.A. 59-60, 65, 69-70 (¶¶ 16, 34, 50-52). Following a contractual dispute with Petróleo, Helmerich & Payne, Inc.—the ultimate parent of H&P-IDC and H&P-V—announced that H&P-V would cease drilling operations in Venezuela when its contracts expired. J.A. 69-70 (¶ 50). By the end of 2009, H&P-V had ceased drilling, disassembled its eleven oil rigs, and stored them in H&P-V's yards. J.A. 70 (¶ 53).

In June 2010, the Venezuelan National Assembly published a Bill of Agreement declaring that H&P-V's oil rigs and associated property were of "public utility and social interest." C.A. J.A. 97 (Bill of Agreement). It found that the rigs were "idle,"

"inactive," and "very scarce," and that "the use of the oil rigs was necessary" for drilling wells in Venezuela. *Id.* The Bill of Agreement therefore recommended that the National Executive expropriate the eleven oil rigs and related property. *Id.* The National Executive did so. C.A. J.A. 104-107 (Decree of Expropriation). Expropriation proceedings in the Venezuelan courts began in July 2010 to effectuate transfer of title to the property, determine the fair value of the assets, and provide compensation to all interested parties. J.A. 75-76, 78-79 (¶¶ 72-73, 86-88); C.A. J.A. 107 (Decree of Expropriation art. 4). H&P-V has appeared in these proceedings, which are ongoing. J.A. 75-76 (¶¶ 72-73).

B. Procedural History

1. In September 2011, H&P-IDC and H&P-V filed a two-count complaint in the United States District Court for the District of Columbia against the Republic, PDVSA, and Petróleo. Both plaintiffs asserted a joint claim against all three defendants for a taking in violation of international law, and each sought the same damages remedy for the taking. J.A. 103-104 (¶¶ 172-181) (Count I); *see* J.A. 115 (¶ 282). In addition, H&P-V claimed that PDVSA and Petróleo had breached certain of the parties' drilling-services contracts (the "Drilling Contracts"). J.A. 104-115 (¶¶ 182-281) (Count II).

The H&P plaintiffs purported to bring this case under the FSIA, alleging that the Republic is a "foreign state" under 28 U.S.C. § 1603(a), and PDVSA and Petróleo are each an "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(b). J.A. 57-59 (¶¶ 11-13). Accordingly, these defendants are presumptively immune from the jurisdiction of

the district court. The court has subject-matter jurisdiction only if one of the FSIA's exceptions to Venezuela's foreign-sovereign immunity applies. For the takings claim, both plaintiffs invoked the expropriation exception, 28 U.S.C. § 1605(a)(3) (abrogating immunity in cases "in which rights in property taken in violation of international law are in issue" and there is the requisite nexus to the United States), and for the contract claims, H&P-V cited the commercial-activity exception, *id.* § 1605(a)(2) (abrogating immunity in cases "in which the action is based * * * upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States").

2. Defendants moved to dismiss the complaint on multiple jurisdictional and other threshold grounds. The H&P plaintiffs responded with a motion to compel preliminary fact discovery on jurisdiction, immunity, and venue. Pls.' Mot. to Compel, 11-cv-1735 Docket Entry No. 29 (Oct. 23, 2012).

After briefing on the motion to compel was completed, but before the H&P plaintiffs had filed any opposition to defendants' motions to dismiss, the parties reached an agreement concerning the pending motions. Joint Stipulation, 11-cv-1735 Docket Entry No. 34 (Jan. 10, 2013). Under that agreement, the H&P plaintiffs withdrew their motion to compel discovery, and the parties sought instead to follow the procedure approved by the court of appeals in *I.T. Consultants, Inc.* v. *Islamic Republic of Pak.*, 351 F.3d 1184 (D.C. Cir. 2003), by identifying issues that could be resolved as matters of law on the face of the complaint and briefing those issues first. *See id.* at 1188 (foreign state may seek "a ruling on its immuni-

ty on the basis of the allegations in the complaint" before the district court must "resolve any relevant factual disputes"). This approach had the potential to secure a threshold dismissal of the case on immunity grounds without the need for the district court to resolve any factual issues related to jurisdiction.

The issues were: (1) whether H&P-V was a national of Venezuela and therefore unable to claim that a taking of its property constituted a violation of international law under the expropriation exception; (2) whether the district court could reach a particular defense (act-of-state) before resolving the FSIA issues and, if so, whether that defense barred the takings claim; (3) whether H&P-V had pleaded a direct effect in the United States as required by the commercial-activity exception; and (4) whether H&P-IDC as a corporate parent could invoke the expropriation exception when the property expropriated belonged to its subsidiary H&P-V J.A. 119-120.

3. The district court accepted the parties' stipulation, ordering that briefing on the motions to dismiss would proceed on the four issues identified by the parties. J.A. 117-121. At the conclusion of the briefing, the court granted in part and denied in part the motions to dismiss with respect to those issues. J.A. 124-169.

On the takings claim, the two disputed jurisdictional issues—issues (1) and (4) above—could be reduced to a single question: whether H&P-V and H&P-IDC had each pleaded that their "rights in property taken in violation of international law are

in issue." 28 U.S.C. § 1605(a)(3). The district court answered that question differently for each plaintiff.[1]

For H&P-V, the district court held that because H&P-V is a Venezuelan corporation, it is a Venezuelan national under international law. J.A. 134-142. The expropriation exception thus did not apply to H&P-V's takings claim; under the domestic-takings rule, a sovereign's taking of the property of its own national does not violate international law. *Id.*

The district court reached the opposite conclusion for H&P-IDC. The court held that H&P-IDC could claim that its own "rights in property" were "in issue" for purposes of the expropriation exception. J.A. 160-168. Even though the property taken was owned, possessed, and operated solely by its subsidiary, H&P-V, the court ruled that Venezuela had deprived H&P-IDC "of its essential and unique rights as sole shareholder of H&P-V" by, among other things, "frustrating its control over the company." J.A. 168.

The district court denied PDVSA and Petróleo's motion to dismiss the contract claims, holding that the alleged breaches of contract had a direct effect in the United States and thus were within the court's jurisdiction. J.A. 146-158.

4. a. Both sides appealed. Invoking appellate jurisdiction under the collateral-order doctrine, Vene-

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[1] The district court declined to resolve the act-of-state issue, concluding that it could not reach a merits defense before resolving all jurisdictional issues. J.A. 142-146. Although Petitioners maintain that was error, the D.C. Circuit declined to exercise pendent appellate jurisdiction over the issue, J.A. 187-188, and it is not now before this Court.

zuela appealed the district court's conclusion that H&P-IDC could invoke the property rights of its subsidiary, H&P-V, to obtain jurisdiction over the defendants under the expropriation exception. *See, e.g.*, *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 854 (2009); *Permanent Mission of India to United Nations* v. *City of New York*, 551 U.S. 193, 197 (2007) (*Permanent Mission*). H&P-V, for its part, cross-appealed the district court's domestic-takings ruling after the court entered partial final judgment against H&P-V under Federal Rule of Civil Procedure 54(b). *See* Pet. App. 92a-94a.

b. The D.C. Circuit affirmed in part and reversed in part. J.A. 170-199. In a split decision, two of the three panel members applied what they described as the D.C. Circuit's "exceptionally low bar" for evaluating jurisdictional pleadings under the expropriation exception. J.A. 178. The majority explained, "we will grant a motion to dismiss on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property * * * in issue' *only* if the claims are 'wholly insubstantial or frivolous.'" *Id.* (ellipsis in original) (quoting *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 943 (D.C. Cir. 2008)).

Assessing H&P-V's takings claim alongside that "exceptionally low bar," the majority held that the district court erred in dismissing it. Citing *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964), the majority concluded that, because the complaint had alleged that the expropriation of H&P-V's property was motivated by discriminatory animus against the company's American parent corporation (H&P-IDC), the case *might* fall within a

supposed "discrimination" exception to the domestic-takings rule. J.A. 179-183. The majority recognized that *Sabbatino* had never been applied to the FSIA's jurisdictional provisions, but nevertheless concluded that, "[d]ated and uncited as it may be, * * * *Sabbatino* remains good law." J.A. 181. And that was enough under the D.C. Circuit's "forgiving standard" to "surviv[e] a motion to dismiss in an FSIA case." J.A. 182.

The majority next affirmed the district court's refusal to dismiss H&P-IDC's takings claim because H&P-IDC—as the sole shareholder of H&P-V—had purportedly pleaded, in a non-frivolous manner, that its *own* rights in the property of H&P-V were taken in the expropriation. J.A. 183-187. The majority rejected Venezuela's argument that *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), stood for the proposition that the FSIA incorporated basic principles of corporate law, such that a shareholder does not have an independent and direct property interest in corporate assets that it may assert under the expropriation exception. J.A. 184. To the contrary, the majority found that a vacated D.C. Circuit due-process decision established that "shareholders may have rights in corporate property." J.A. 185 (citing *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1517 (D.C. Cir. 1984) (en banc), *cert. granted, judgment vacated*, 471 U.S. 1113 (1985)). The majority also read this Court's decision in *Permanent Mission*, 551 U.S. 193, to demonstrate that, irrespective of corporate-ownership principles, the FSIA "imposes no limitation on the source" of the "rights in property" that may be claimed under the expropriation exception. J.A. 185-187. Based on this chain of reasoning, the majority concluded that H&P-IDC, as

H&P-V's corporate parent (and sole shareholder), had non-frivolously pleaded that it had property rights in issue, even though it did not own, possess, or have contractual rights to the oil rigs and related property at the heart of the parties' dispute. J.A. 187.

Finally, all three panel members agreed that the district court's finding of jurisdiction over H&P-V's contract claims should be reversed. They unanimously held that the alleged breaches did not cause a direct effect in the United States under the FSIA's commercial-activity exception. J.A. 188-193.

c. Judge Sentelle dissented from the panel's ruling on the takings claim. J.A. 194-199. As for H&P-V, he reasoned that "[w]hen appellees chose to incorporate under Venezuelan law, they bargained for treatment under Venezuelan law." J.A. 196. In Judge Sentelle's view, allowing H&P-V to subject Venezuela to litigation on the merits, simply by pleading discrimination, "appears *** to violate Venezuela's sovereignty, the value protected by the FSIA." *Id.* He rejected *Sabbatino* as providing an adequate basis for an exception to the domestic-takings rule and would instead "conclude that Venezuela's reliance on the domestic takings rule is well taken and should compel the dismissal of [H&P-V]'s expropriation claim for want of jurisdiction." *Id.*

Judge Sentelle also disagreed with the majority's decision on H&P-IDC's claim. He observed that, under traditional corporate-law principles, "shareholders ordinarily have no standing to assert claims on behalf of a corporation for its property." J.A. 197 As Judge Sentelle saw it, no authority has rejected the application of general corporate-law principles to the

FSIA, so there was no reason to depart from those principles when interpreting the statute. *Id.* Judge Sentelle also concluded that the D.C. Circuit's decision in *Ramirez*—the judgment for which was subsequently vacated—was not binding precedent, and was not on point in any event because it was a due process case. J.A. 198-199.

d. Venezuela sought panel rehearing and rehearing en banc. The panel denied the petition, with Judge Sentelle voting to grant rehearing. Pet. App. 95a-96a. A vote for rehearing en banc was called, but a majority of the court's active judges declined to rehear the case. Pet. App. 97a-98a.

5. Venezuela moved in the court of appeals and this Court to stay the mandate pending a petition for certiorari. Both motions were denied. The parties returned to the district court, where the H&P plaintiffs filed a second motion to compel discovery. Because Venezuela's "purely legal claims for dismissal based on sovereign immunity" had "been rejected," the H&P plaintiffs claimed they were entitled to sweeping discovery from Venezuela concerning the factual bases for Venezuela's jurisdictional challenge. Pls.' Mem. of Points & Auths., Second Mot. to Compel 1, 11-cv-1735 Docket Entry No. 81 (Jan. 20, 2016). The district court granted in part and denied in part the H&P plaintiffs' motion to compel, ordered PDVSA and Petróleo to turn over a significant amount of discovery, and directed the Republic also to participate in discovery. Order & Mem. Op., 11-cv-1735 Docket Entry Nos. 113, 114 (May 13, 2016).

6. Both sides petitioned this Court for certiorari. The Court granted certiorari on the third question presented by Venezuela's petition: whether the

pleading standard for alleging that a case falls within the FSIA's expropriation exception is more demanding than the standard for pleading jurisdiction under the federal-question statute, which allows a jurisdictional dismissal only if the federal claim is wholly insubstantial and frivolous. The district court subsequently stayed all proceedings pending resolution of the matter before this Court. Order, 11-cv-1735 Docket Entry No. 124 (June 28, 2016).

SUMMARY OF ARGUMENT

This case asks the Court to decide what standard courts should use to evaluate the legal sufficiency of a complaint's jurisdictional allegations under the FSIA's expropriation exception. The answer is that a court should decide whether the complaint pleads *legally recognized* rights in property and a taking that is an *actual* violation of customary international law.

I. The FSIA creates an express statutory presumption of foreign-sovereign immunity. *See* 28 U.S.C. § 1604; *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993). This presumption can be overcome—and a court may assert jurisdiction over a claim against a foreign sovereign—only if the substantive requirements for abrogating foreign-sovereign immunity set forth in 28 U.S.C. §§ 1605-1607 are satisfied. *See id.* § 1330(a). Because the Act carefully "carves out" these "exceptions to its general grant of immunity," *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004), courts must take special care to ensure that their requirements are met, lest an overly expansive standard upset the careful balance Congress struck.

To this end, when deciding cases evaluating the legal sufficiency of the pleadings under the FSIA's ex-

ceptions, this Court has consistently applied a single standard. A plaintiff must plead facts that, if taken as true, establish the existence of all of the elements set out in the relevant statutory exception. Then, "the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493-494 (1983).

The expropriation exception is no different. To be sure, depending on how a plaintiff chooses to plead its cause of action, the requirements of the expropriation exception might overlap with the elements of the underlying claim for relief—but that is no reason to depart from the usual analysis. In prior cases involving the FSIA's exceptions, this Court has not hesitated to decide jurisdictional questions that happen to overlap with issues affecting the merits. The text, history, and purpose of the FSIA, as well as this Court's precedents, demand that the same standard apply to the expropriation exception as applies to the other exceptions. Under that standard, a court evaluating the legal sufficiency of the jurisdictional pleadings should decide whether the rights claimed to be "in issue" in the complaint actually *are* "rights in property taken in violation of international law." 28 U.S.C. § 1605(a)(3).

II. The court of appeals below did not follow this jurisdictional analysis. Instead, the court concluded that a complaint survives jurisdictional dismissal so long as its allegations that "rights in property taken in violation of international law are in issue," *id.*, are not "'wholly insubstantial or frivolous.'" J.A. 178 (citation omitted). This standard derives from *Bell* v. *Hood*, 327 U.S. 678 (1946), which governs cases

brought under the federal-question statute, 28 U.S.C. § 1331. *See* J.A. 178 (quoting *Bell*, 327 U.S. at 682). *Bell* did not create a general rule applicable to all jurisdictional statutes, however; it interpreted Section 1331. Its non-frivolousness standard thus has no place in the evaluation of FSIA pleadings.

And there are good reasons not to apply the federal-question pleading standard to the expropriation exception. For starters, the text of the federal-question statute is not comparable to the text of the expropriation exception. Section 1331 imposes no substantive prerequisites to jurisdiction; it broadly confers jurisdiction over any "civil action[ ] arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The expropriation exception, by contrast, is one of the FSIA's substantive prerequisites that—as befits an exception—is far more specific. It requires a plaintiff to put "in issue" a specific type of right ("rights in property"), alleged harm ("taken"), and legal violation ("in violation of international law"). *Id.* § 1605(a)(3).

The histories, policies, and purposes of the two statutes also are completely different. The federal-question statute is intended to determine whether a case is properly brought in federal court, or whether it instead should be litigated in state court—which is why, under that statute, courts ask only whether the plaintiff has pleaded a non-frivolous federal question. The FSIA, by contrast, governs whether a foreign state may be sued in *any* United States court. If none of the exceptions is satisfied, the foreign state is immune from the jurisdiction of U.S. courts entirely for that dispute. Because of this, and the presumption that foreign states are normally and ordinarily immune from jurisdiction, this Court has always lim-

ited jurisdiction over foreign states to cases where plaintiffs have pleaded facts that, if taken as true, actually establish all of the requirements of the relevant exception.

Finally, the consequence of applying the *Bell* standard further shows how poorly it fits within the context of the FSIA. Under the court of appeals' approach, a plaintiff may hale a foreign state into court and subject it to the burdens of litigation—so long as the complaint's allegations meet *Bell*'s "exceptionally low" non-frivolousness standard. J.A. 178. Foreign-sovereign immunity is supposed to protect foreign states from the burdens of litigation; the court of appeals' rule makes them a matter of course.

ARGUMENT

I. THE EXPROPRIATION EXCEPTION REQUIRES A COURT TO DECIDE WHETHER A COMPLAINT HAS ACTUALLY PUT "IN ISSUE" "RIGHTS IN PROPERTY TAKEN IN VIOLATION OF INTERNATIONAL LAW."

A. Foreign States Are Presumptively Immune From The Jurisdiction Of U.S. Courts.

A strong presumption *against* jurisdiction forms the starting point for any FSIA analysis: "a foreign state *shall be immune* from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604 (emphasis added). Thus the FSIA at the outset puts a heavy thumb on the immunity side of the scale: "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies,

a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993).

1. There is a historical reason behind this strong presumption. "From the Nation's founding until 1952, foreign states were 'generally granted *** complete immunity from suit' in United States courts *** " *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 n.1 (1989) (*Amerada Hess*) (first ellipsis in original) (quoting *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (*Verlinden*)). Courts declined to exercise jurisdiction over suits against foreign states in deference to the Executive Branch's judgment about the foreign-policy consequences of such suits. *See Verlinden*, 461 U.S. at 486. After the State Department adopted a "restrictive" theory of sovereign immunity in 1952—limiting immunity to "suits involving the foreign sovereign's public acts"—"initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by 'suggestions of immunity' from the State Department." *Id.* at 487

This process proved unwieldy. Accordingly, on the recommendation of the State Department and the Justice Department, Congress passed the FSIA in 1976. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6 (Sept. 9, 1976) (1976 House Report). The FSIA elevated foreign-sovereign immunity to a jurisdictional doctrine "in order to free the Government from [] case-by-case diplomatic pressures" and "to clarify the governing standards." *Verlinden*, 461 U.S. at 488. The new jurisdictional statute imposed on courts the obligation to ensure that the FSIA's requirements

were met at "the threshold of every action." *Id.* at 493-494.

The FSIA is now "the sole basis for obtaining jurisdiction over a foreign state in our courts," *Amerada Hess*, 488 U.S. at 434—a point this Court has emphasized repeatedly. *See, e.g.*, *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 394 (2016) (*OBB Personenverkehr*); *Samantar* v. *Yousuf*, 560 U.S. 305, 314 (2010); *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 197 (2007) (*Permanent Mission*); *Republic of Austria* v. *Altmann*, 541 U.S. 677, 699 (2004); *Nelson*, 507 U.S. at 355; *Republic of Arg.* v. *Weltover, Inc.*, 504 U.S. 607, 611 (1992).

2. By enacting the FSIA, including the statute's presumption of immunity, Congress recognized "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area." *Verlinden*, 461 U.S. at 489 (quoting 1976 House Report 32). Congress therefore made the Act's provisions "comprehensive," "substantive," and "detailed." *Id.* at 488, 494, 498. It adopted international-law norms for state sovereign immunity as the governing standard, codifying "international law at the time of the FSIA's enactment." *Permanent Mission*, 551 U.S. at 199. And it combined disparate jurisdictional elements in atypical ways. Unlike other jurisdictional statutes, the FSIA combines elements of "both statutory subject matter jurisdiction * * * and personal jurisdiction." *Verlinden*, 461 U.S. at 485 n.5. *Compare Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583-584 (1999) (explaining the typical distinctions between subject-matter and personal jurisdiction). "[Section] 1330(b) provides personal jurisdiction wherever subject-matter jurisdiction ex-

ists under subsection (a) and service of process has been made under [Section] 1608." *Verlinden*, 461 U.S. at 485 n.5. The Act's subject-matter provisions in turn borrow from personal-jurisdiction concepts, conferring subject-matter jurisdiction over cases where there is "some form of substantial contact" between the foreign state and the United States, *id.* at 490, or where "the foreign state has waived its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1); 1976 House Report 13.

3. The FSIA's presumption of immunity can be overcome only by satisfying the substantive requirements set forth in 28 U.S.C. §§ 1605-1607 for abrogating foreign-sovereign immunity. *See Verlinden*, 461 U.S. at 488. These statutory exceptions are carefully "carve[d] out" from the Act's "general grant of immunity." *Altmann*, 541 U.S. at 691. They include cases where a "foreign state has waived its immunity," 28 U.S.C. § 1605(a)(1); where "the action is based upon a commercial activity" with a nexus to the United States, *id.* § 1605(a)(2); where "rights in property taken in violation of international law are in issue," and there is a commercial nexus to the United States, *id.* § 1605(a)(3); where "rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue," *id.* § 1605(a)(4); where "money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state" that is non-commercial in nature, *id.* § 1605(a)(5); where a private party seeks to enforce an agreement to arbitrate, or confirm an arbitral award, with the requisite nexus to the United States,

id. § 1605(a)(6); where the action is to enforce a maritime lien, *id.* § 1605(b); where the action is to foreclose a preferred mortgage on a maritime vessel, *id.* § 1605(d); where money damages are sought for personal injury or death caused by acts of state-sponsored terrorism, *id.* § 1605A; and where the foreign state has brought suit or intervened, and the defendant asserts specified types of counterclaims, *id.* § 1607 Unless one of these exceptions is satisfied, the court lacks subject-matter jurisdiction under the FSIA, and the claims against the foreign state must be dismissed. *See* 28 U.S.C. § 1330(a); *Nelson*, 507 U.S. at 355; *Verlinden*, 461 U.S. at 489.

The FSIA's exceptions are "central to the Act's functioning." *Altmann*, 541 U.S. at 691. But they exist in a statutory scheme where foreign states are "ordinarily," *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 851 (2009), and "normally immune from the jurisdiction of federal and state courts," *Verlinden*, 461 U.S. at 488. *See also, e.g.*, *OBB Personenverkehr*, 136 S. Ct. at 394; *Permanent Mission*, 551 U.S. at 197 The standard for assessing jurisdiction over foreign states is therefore demanding. This Court has recognized as much in its decisions interpreting the FSIA. In *Verlinden*, the Court held that "[a]t the threshold of every action in a District Court against a foreign state, * * * the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act." 461 U.S. at 493-494; *accord Altmann*, 541 U.S. at 691; *see also* U.S. Cert.-Stage Br. 7-10.

B. This Court Applies A Single Standard To Review Jurisdictional Pleadings Under The FSIA's Exceptions.

1. This Court has put *Verlinden*'s principle into practice on several occasions, each time resolving at the pleading stage whether the complaint alleged facts that, if taken as true, *actually* established the requirements of the relevant FSIA exception. *See OBB Personenverkehr*, 136 S. Ct. at 395-396; *Permanent Mission*, 551 U.S. at 198-199; *Nelson*, 507 U.S. at 358, 363; *Amerada Hess*, 488 U.S. at 439-443.

In *Permanent Mission*, 551 U.S. 193, the Court considered a case involving the immovable-property FSIA exception—a provision worded similarly to the expropriation exception. That exception applies to cases "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). New York had sought a declaration that its tax lien on property owned in the State by the Government of India was valid. 551 U.S. at 195. The question presented was "whether an action seeking a declaration of the validity of a tax lien places 'rights in immovable property * * * in issue.'" *Id.* at 198 (ellipsis in original). On review, and after surveying the relevant New York legal authorities, this Court concluded that the answer was yes: "A tax lien * * * inhibits"—not colorably inhibits, but *actually* inhibits—"one of the quintessential rights of property ownership—the right to convey." *Id.*

2. The H&P plaintiffs have argued that a different standard applies when the substantive requirements of an FSIA exception overlap with the plaintiff's cause of action. *See* Resp. Suppl. Br. 6-9. Yet this Court's prior cases establish that the standard for

reviewing pleadings does not depend on the plaintiff's particular claim for relief. The pleadings must satisfy *all* requirements of the relevant FSIA exception, *even if* courts might have to evaluate the legal sufficiency of allegations common to both jurisdiction and the underlying cause of action.

a. Take *Amerada Hess*, 488 U.S. 428, as an example. In that case, the plaintiffs sued the Argentine Republic "to recover damages for a tort allegedly committed by its armed forces on the high seas in violation of international law." *Id.* at 431. The plaintiffs argued that the FSIA conferred jurisdiction over the case, and that the non-commercial-torts exception, 28 U.S.C. § 1605(a)(5), was "most in point." *Amerada Hess*, 488 U.S. at 439. This Court disagreed. It concluded that the non-commercial-torts exception did not apply because the plaintiffs' injury occurred on the high seas—not in the United States, as required by that exception. *Id.* at 440. And the Court went a step further still. It listed all the potentially applicable FSIA exceptions to sovereign immunity, *including* the expropriation exception. *Id.* at 439. Then, based on its assessment of the pleadings, and without regard to whether any of the jurisdictional requirements overlapped with merits issues, the Court held that "*none* of the enumerated exceptions to the Act apply to the facts of this case." *Id.* at 443 (emphasis added).

The Court also considered and rejected the plaintiffs' argument that they might circumvent the Argentine Republic's sovereign immunity through certain international agreements. *Id.* at 442; *see* 28 U.S.C. § 1604 (foreign-sovereign immunity is "[s]ubject to existing international agreements to which the United States is a party at the time of en-

actment of this Act"). If any of those agreements created private rights of action, the plaintiffs not only would establish jurisdiction over the foreign state, they also would have a claim for relief. There was, therefore, an overlap between the jurisdictional question and a merits issue. Nonetheless, the Court determined on a jurisdictional motion to dismiss that the cited agreements "do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Amerada Hess*, 488 U.S. at 442.

b. In *Nelson*, 507 U.S. 349, the Court applied the same type of analysis to the FSIA's commercial-activity exception, 28 U.S.C. § 1605(a)(2). In that case, plaintiff Nelson had been recruited in the United States to work at a hospital in Saudi Arabia. *Nelson*, 507 U.S. at 352. He alleged that after complaining of various safety defects at the hospital, he was imprisoned and tortured. *Id.* Nelson and his wife sued Saudi Arabia, its state-owned hospital, and the company that had recruited Nelson for various intentional torts, as well as on a theory that the defendants had failed to warn him (in the United States) of the dangers of his employment (in Saudi Arabia). *Id.* at 354. The question presented was whether the plaintiffs' personal-injury suit "resulting from unlawful detention and torture by the Saudi Government" was "based upon" the requisite commercial activity in the United States. *Id.* at 351. The Court concluded it was not.

In reaching its decision, the Court interpreted "based upon" to mean "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357; *see id.* (describing this as the "'gravamen of the complaint'"

(citation omitted)). The question what "would entitle a plaintiff to relief," of course, overlapped with the merits of the underlying claims. But the Court was undeterred by this overlap. It reviewed the plaintiffs' allegations, identified the gravamen of the complaint, and decided whether that core of the complaint was a commercial activity in the United States. *Id.* The Court did not just take the plaintiffs' word for what entitled them to relief; indeed, the Court rejected the plaintiffs' efforts to identify activity taking place in the United States as the purported gravamen of their complaint, reasoning that "those facts alone entitle the [plaintiffs] to nothing under their theory of the case." *Id.* at 358. Thus the Court determined what would *actually* entitle the plaintiffs to relief (assuming the truth of their allegations), and rendered its decision on that basis. *See id.*

The Court was even more hostile to the plaintiffs' failure-to-warn claim. It declined to alter the jurisdictional analysis based on the complaint's inclusion of that particular claim, describing the claim as "merely a semantic ploy." *Id.* at 363. The Court explained: "For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn," improperly giving "jurisdictional significance" to a mere "feint of language." *Id.* In other words, the Court would not allow the plaintiffs to use artful pleading to turn an FSIA exception into the rule. *See id.*

c. The Court confirmed this approach just last Term in *OBB Personenverkehr*, 136 S. Ct. 390. The issue in that case was whether the plaintiff's claims for personal injury resulting from dangerous conditions at a state-owned railroad station in Austria were "based upon" commercial activity in the United

States. *Id.* at 393. The plaintiff bought a ticket for carriage through the railway's agent here, and she contended that the ticket purchase was sufficient to trigger the commercial-activity exception, in part because the railway agent failed to warn her at the time of the sale (in the United States) of the dangerous railway condition (in Austria). *Id.* This Court looked past that contention, examined the allegations of the complaint, and decided whether the purchase of the ticket was the gravamen of the complaint—meaning the source of plaintiff's injury. *Id.*

As in *Amerada Hess* and *Nelson*, the Court's jurisdictional analysis required it to decide issues that overlapped with the plaintiff's causes of action. The Court had to identify the source of the plaintiff's injury and determine the viability of her failure-to-warn claim. And it did so: Just as it had in *Nelson*, the Court "zeroed in" on the acts that "actually injured" the plaintiff. *Id.* at 396. There was "nothing wrongful" about the ticket sale in the United States standing alone, *id.*, and thus no sense in which that single U.S. ticket sale gave rise to the plaintiff's injury. That the plaintiff pleaded a failure-to-warn claim did not change the analysis in the slightest. Because a plaintiff could recast virtually any intentional tort claim as a failure to warn, the Court explained, "any other approach would allow plaintiffs to evade the Act's restrictions through artful pleading." *Id.*

3. Applying the same rule to the expropriation exception, courts evaluating jurisdictional pleadings under that exception should determine whether plaintiffs have *actually* put "in issue" "rights in property taken in violation of international law." 28 U.S.C. § 1605(a)(3). Under *Permanent Mission*, a plaintiff puts "rights in property * * * in issue" when

it pleads the existence of rights in property that are *legally recognized* under the law of the place where the property in issue was located at the time of the taking. And following the logic of *Amerada Hess*, *Nelson*, and *OBB Personenverkehr*, a plaintiff pleads that its property rights were "taken in violation of international law" only when it alleges a taking that *actually* violates customary international law. *See* U.S. Cert.-Stage Br. 7-10 (arguing for same standard). That is, the alleged taking must be a violation "'of a norm that is specific, universal, and obligatory.'" *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 (2004) (citation omitted); *see also, e.g.*, *Simon* v. *Republic of Hung.*, 812 F.3d 127, 145-146 (D.C. Cir. 2016) (applying *Sosa*'s standard for violations of customary international law to the expropriation exception); *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661, 676 (7th Cir. 2012) (same).

C. The Court's Usual Standard For Reviewing Pleadings Under The FSIA's Exceptions Should Apply To The Expropriation Exception.

It makes sense to apply the same standard for reviewing jurisdictional pleadings to all of the FSIA's exceptions. The same presumption of immunity begins the analysis, *see* 28 U.S.C. § 1604, and all of the exceptions identify the specific circumstances that overcome that presumption, *Nelson*, 507 U.S. at 355. Applying the same standard across the board allows for predictability and ease of administration because the standard does not turn on each plaintiff's cause of action. By contrast, there are good reasons *not* to adopt a different standard for the expropriation exception, just because the plaintiff might plead a

cause of action that overlaps with the statutory requirements for the exception.

First, the jurisdictional inquiry does not necessarily have to overlap with merits issues in expropriation-exception cases. To the extent they overlap in this case, that is solely the product of the H&P plaintiffs' pleading choices. When a case falls within the expropriation exception, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Thus, plaintiffs bringing suit under the expropriation exception do not have to plead "a taking without just compensation in violation of international law" as their cause of action; they may "seek recovery based on garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution." *Simon*, 812 F.3d at 141. In such cases, "the jurisdictional and merits inquiries do not overlap." *Id.*

In light of this fact, if the Court were to adopt the D.C. Circuit's rule—whereby the applicable standard of review turns on the plaintiff's chosen cause of action—the FSIA jurisdictional analysis would turn into a game of "artful pleading." *OBB Personenverkehr*, 136 S. Ct. at 396. The plaintiff's pleading choices would dictate the standard of review, rather than the statute. Such a result would give "jurisdictional significance" to mere "feint of language" in the complaint. *Nelson*, 507 U.S. at 363. And that is precisely what this Court has held should *not* happen. *See OBB Personenverkehr*, 136 S. Ct. at 396-397; *Nelson*, 507 U.S. at 363; *see also infra* Section II.B, pp. 39-41.

Second, the text of the expropriation exception does not allow for a lesser standard of review. The excep-

tion confers jurisdiction only where "rights in property taken in violation of international law *are* in issue." 28 U.S.C. § 1605(a)(3) (emphasis added). It does not allow courts to assert jurisdiction where the specified rights are *colorably* in issue. The demands of the pleading standard therefore must meet the demands of the statute. A standard that does not ensure the expropriation exception's requirements are actually met would clash with the statutory text.

Third and finally, a standard that does not determine whether all elements of the claimed FSIA exception are satisfied at the pleading stage fails to resolve foreign-sovereign immunity at the earliest possible stage of the litigation. That result is contrary to this Court's instruction that courts "must" ensure that the FSIA's requirements are met at "the threshold of every action." *Verlinden*, 461 U.S. at 493-494.

After all, the FSIA is intended to give foreign states "some protection from the inconvenience of suit." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003) (*Dole Food*). Immunity is "not just a defense to liability on the merits"; it is "immunity from trial and the attendant burdens of litigation." *Phoenix Consulting, Inc.* v. *Republic of Ang.*, 216 F.3d 36, 39 (D.C. Cir. 2000) (citation and quotation marks omitted). "In order to preserve the full scope of that immunity, the district court must make the critical preliminary determination of its own jurisdiction as early in the litigation as possible; to defer the question is to frustrate the significance and benefit of entitlement to immunity from suit." *Id.* (citation and quotation marks omitted). Therefore, at the pleading stage, "the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the exceptions to

immunity invoked by the plaintiff." *Id.* at 40 (citing, among other cases, *Nelson*, 507 U.S. at 351, 361).

II. THE FEDERAL-QUESTION PLEADING STANDARD DOES NOT APPLY TO THE EXPROPRIATION EXCEPTION.

The D.C. Circuit did not decide whether the H&P plaintiffs had cleared the FSIA's jurisdictional bar by actually pleading rights in property taken in violation of international law. Instead the court applied a standard that is, in the panel majority's own words, "exceptionally low." J.A. 178. The court will dismiss "on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property * * * in issue' *only* if the claims are 'wholly insubstantial or frivolous.'" *Id.* (ellipsis in original) (quoting *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 943 (D.C. Cir. 2008) (*Agudas*)). That standard for dismissal, which is derived from the standard for reviewing jurisdictional pleadings under 28 U.S.C. § 1331, has no place in an FSIA analysis. *See* U.S. Cert.-Stage Br. 10-13.

A. The Expropriation Exception Does Not Create A Standard "Analogous" To The Federal-Question Statute.

1. The "wholly insubstantial and frivolous" standard for reviewing jurisdictional pleadings comes from *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946). The plaintiffs in *Bell* sued federal officials for an alleged violation of their Fourth and Fifth Amendment rights. *Id.* at 679. The trial court had dismissed the case on jurisdictional grounds, concluding that the plaintiffs' claims did not "arise[ ] under the Constitution or laws of the United States" as required by the

federal-question statute. *Id.* at 680 (quoting former 28 U.S.C. § 41(1), now 28 U.S.C. § 1331). The court of appeals affirmed. This Court reversed. *Id.* at 685. It explained that a suit arises under federal law if the complaint "is drawn so as to claim a right to recover under the Constitution and laws of the United States," *id.* at 681—*unless* "the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous," *id.* at 682-683.[2]

2. a. The court of appeals below interpreted the expropriation exception to import the *Bell* standard for pleading jurisdiction, citing *Agudas*, 528 F.3d 934. *See* J.A. 178. *Agudas*, in turn, interpreted the expropriation exception as a bifurcated standard with two categories of requirements. *See* 528 F.3d at 940-942. According to the two-judge majority in that case, the first category is made up of "purely factual predicates independent of the plaintiff's claim"; namely, that there must be a connection between the alleged taking and specified commercial activity in the United States. *Id.* at 941. The second category is the requirement that "rights in property taken in violation of international law are in issue," 28 U.S.C. § 1605(a)(3)—which, according to the majority, "does not involve jurisdictional facts, but rather concerns what the plaintiff has put 'in issue,' effectively requiring that the plaintiff assert a certain type of

[2] The court of appeals uses the language "'wholly insubstantial *or* frivolous,'" J.A. 178 (emphasis added; citation omitted), whereas this Court uses the language "wholly insubstantial *and* frivolous," *Bell*, 327 U.S. at 682-683 (emphasis added). The difference does not appear to be material.

claim." 528 F.3d at 941. This second category imposes a jurisdictional requirement similar to that in the federal-question statute, the majority reasoned, and therefore the *Bell* standard for reviewing jurisdictional pleadings should apply. *See id.* at 940.

Judge Henderson, concurring in the judgment only, disagreed with the majority's analysis. *Id.* at 955-956 (Henderson, J., concurring in the judgment). In her view, there was no basis to bifurcate the elements of the expropriation exception: "*Any* jurisdictional fact, once challenged, may require the district court to satisfy itself of its jurisdiction." *Id.* at 956.

b. For their part, the H&P plaintiffs' textual defense of the court of appeals' standard appears in a lone footnote of their Brief in Opposition. They appear to adopt the *Agudas* majority's reasoning by broadly contending that the language in Section 1605(a)(3) creates a "standard analogous" to that in Section 1331. Br. in Opp. 26 n.12.

3. a. The H&P plaintiffs and the *Agudas* majority are incorrect. The two statutory standards are not remotely "analogous." The federal-question statute requires only that an action "aris[e] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. It does not define or otherwise limit the rights that must be in issue or the harm that must be alleged. Nor does it speak in terms of violations of law. Given the statute's open-ended language, it makes sense that this Court construed the language to confer jurisdiction when "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Bell*, 327 U.S. at 685.

The statute requires only that the complaint raise a substantial federal question. *See, e.g.*, *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) (*Grable & Sons*).

The expropriation exception, on the other hand, goes well beyond requiring a complaint to raise a particular type of question. It is one of the Act's specific, substantive, and "detailed federal law standards," *Verlinden*, 461 U.S. at 494, which applies only if "rights in property taken in violation of international law are in issue," 28 U.S.C. § 1605(a)(3). The expropriation exception therefore speaks in terms of a specific type of right ("rights in property"), alleged harm ("taken"), and legal violation ("in violation of international law"). It is not "analogous" to the federal-question statute, at all.

Moreover, if Congress wanted to adopt the federal-question standard for the FSIA's expropriation exception, it easily could have done so. When Congress enacted the FSIA in 1976, the "arising under" standard for jurisdiction under the Constitution had existed for nearly 200 years, and its statutory counterpart for 100 years. *See* U.S. Const. art. III, § 2, cl. 1; Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. The statutory words had a well-understood meaning in the "vast majority of cases." *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Tr.*, 463 U.S. 1, 9 (1983). Namely, "[a] suit arises under the law that creates the cause of action." *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). And since at least as early as this Court's 1946 *Bell* decision, the requirements for pleading federal-question jurisdiction have been established. *See* 327 U.S. at 681-683, 685. Thus, for at least thirty years before the FSIA's passage, the test for pleading "arising un-

der" federal-question jurisdiction was well-defined. *See id. Compare Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1571 (2016) (*Merrill Lynch*) (observing that when the Securities Exchange Act was passed in 1934, there was not yet a "well-defined test" for statutory "arising under" jurisdiction).

Yet Congress did not in Section 1605(a)(3) confer jurisdiction over cases *arising under the international law of property takings*. It conferred jurisdiction over cases "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). This Court should give effect to that distinct choice.

b. The histories and policies of the two statutes also are entirely different, which further counsels against applying the federal-question pleading standard to the expropriation exception. *See Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (identifying the "history and policy" of the federal-question statute as important to its interpretation). We have already recounted the FSIA's history and policy. The Act is the sole basis for obtaining jurisdiction over foreign states; it begins with a presumption of immunity and then creates specific exceptions; it codified international law on state sovereign immunity at the time of its enactment; it was designed to make the legal standards for immunity uniform; and it requires courts to ensure that the Act's detailed requirements are met at the threshold of every action. *See supra* Section I.A, pp. 17-21.

As for federal-question jurisdiction, the first permanent appearance of a statutory grant of original "arising under" federal-question jurisdiction was in

the Judiciary Act of 1875. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470; *see Romero*, 358 U.S. at 363. It was "the 'culmination of a movement *** to strengthen the Federal Government against the states.'" James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. Pa. L. Rev. 639, 645 (1942) (quoting Felix Frankfurter & James M. Landis, *The Business of the Supreme Court* 65 n.34 (1927)); *see also Romero*, 358 U.S. at 368 ("The far-reaching extension of national power resulting from the victory of the North, and the concomitant utilization of federal courts for the vindication of that power in the Reconstruction Era, naturally led to enlarged jurisdiction of the federal courts over federal rights."). The federal-question statute thus codified a "sound division of labor between state and federal courts." *Grable & Sons*, 545 U.S. at 313; *see also Franchise Tax Bd. of Cal.*, 463 U.S. at 8 (the federal-question statute concerns "the interrelation of federal and state authority and the proper management of the federal judicial system").

The prospect that foreign states might be subject to suit in the United States never fit into the equation when the federal-question statute was enacted. That was because, at the time, "the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden*, 461 U.S. at 486. The exclusive concern of the federal-question statute was the state-federal divide. Accordingly, and unlike for questions of sovereign immunity, the point of the federal-question analysis is not to resolve whether *any* court in the country, state or federal, can hear the case. It is simply to answer the question of which one.

Indeed, because of the FSIA's distinct history and function, this Court has held once before, in a different context, that the federal-question statute does not control or inform interpretation of the FSIA. This Court in *Verlinden* reversed a court of appeals' ruling that the FSIA was unconstitutional because Article III's "arising under" jurisdiction purportedly was not broad enough to support jurisdiction over actions by foreign plaintiffs against foreign sovereigns. *Id.* at 485-486. The court of appeals' analysis had involved "heavy reliance" on decisions interpreting 28 U.S.C. § 1331 and applying its well-pleaded complaint rule—a reliance that this Court held was "misplaced" and erroneous. *Verlinden*, 461 U.S. at 495. As this Court explained, the "'well-pleaded complaint' rule * * * provides, for purposes of *statutory* 'arising under' jurisdiction, that the federal question must appear on the face of a well-pleaded complaint and may not enter in anticipation of a defense." *Id.* at 494. That statute-specific rule was not required by Article III, and the Court declined to import it into the FSIA. *See id.* at 494-495 & n.20.

Verlinden thus stands for the proposition that this Court will not automatically incorporate pleading rules from the federal-question statute into the FSIA. And that makes good sense; the FSIA is intended to *displace* other jurisdictional standards for suits against foreign states—not mimic them. *See Amerada Hess*, 488 U.S. at 434, 437-438.

c. Applying the *Bell* standard to FSIA pleadings would be irreconcilable with this Court's decisions interpreting the FSIA's exceptions, as well. *Verlinden* instructs that a "court must satisfy itself that one of the [FSIA's] exceptions applies." 461 U.S. at 494. That is why, in *Permanent Mission*, the Court

concluded that the plaintiff had adequately alleged "rights in property * * * in issue" only after reviewing the relevant law and determining that the allegations of the complaint implicated legally recognized property rights. 551 U.S. at 198-199. It is why, in *Amerada Hess*, the Court concluded that "none of the enumerated exceptions to the Act apply to the facts of this case," 488 U.S. at 443, and further that none of the international agreements cited by the plaintiffs gave rise to any actionable rights, *id.* at 442. It is why, in *Nelson*, the Court decided whether the claimed gravamen of the complaint would actually entitle the plaintiffs to relief. 507 U.S. at 358. And it is why the Court did the same thing in *OBB Personenverkehr*. 136 S. Ct. at 396.

None of these decisions applied *Bell*'s frivolousness standard or used any analysis that could even be characterized as comparable to that standard. *Compare Merrill Lynch*, 136 S. Ct. at 1571 (noting that prior Court decisions had held that the Securities Exchange Act language at issue was "coextensive with our construction of 'arising under' "). The reason: A court applying *Bell* asks only whether the plaintiffs' allegations are minimally *colorable*. *See Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 & n.10 (2006). The FSIA, however, requires a court to "apply the detailed federal law standards set forth in the Act." *Verlinden*, 461 U.S. at 494.

d. *Bell*'s "wholly insubstantial and frivolous" standard also cannot be reconciled with the FSIA's presumption of immunity, which, as we have explained, requires that foreign states are "ordinarily" and "normally" immune from U.S. court's jurisdiction. *Beaty*, 556 U.S. at 851; *Verlinden*, 461 U.S. at 488.

Ordinary and normally in litigation, parties do not make wholly insubstantial and frivolous allegations. Those that do may be sanctioned under Federal Rule of Civil Procedure 11 or courts' inherent authority. *See Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 50 (1991). Unsurprisingly, then, it is a "'rare and exceptional case where the action is clearly frivolous.'" *Primus Auto. Fin. Servs., Inc.* v. *Batarse*, 115 F.3d 644, 649 (9th Cir. 1997) (citation omitted). And there's the rub: a pleading standard that ousts a plaintiff in only the "rare and exceptional case," *id.*, is not one that ensures foreign states are "ordinarily" and "normally" immune, *Beaty*, 556 U.S. at 851; *Verlinden*, 461 U.S. at 488. The federal-question statute's pleading standard is therefore fundamentally incompatible with the FSIA's presumption of foreign-sovereign immunity.

B. Applying *Bell* To The Expropriation Exception Would Have Serious Adverse Consequences.

1. Incorporating the *Bell* pleading standard into the FSIA's expropriation exception would create a nest of problems. To begin, the *Bell* frivolousness standard would gut the expropriation exception of any real meaning. The point of the FSIA is to codify "international law at the time of the FSIA's enactment." *Permanent Mission*, 551 U.S. at 199. Congress sensibly limited permissible lawsuits against foreign states to cases where there was established international-law precedent, in light of "'the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area.'" *Verlinden*, 461 U.S. at 489 (quoting 1976 House Report 32). *See generally Permanent*

Mission, 551 U.S. at 200 (looking to "international practice at the time of the FSIA's enactment" to interpret the scope of one of the Act's exceptions). That limitation ensures that domestic courts are not embroiled in cases with potentially devastating foreign-policy consequences—such as those that might recognize property rights that do not exist in the place of the property, or those that adjudicate novel and untested alleged violations of international law. *Cf. Sosa*, 542 U.S. at 728 ("We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.").

Under the *Bell* standard, however, any claim of an unlawful international taking, no matter how untested, establishes jurisdiction under the expropriation exception so long as it is not wholly insubstantial or frivolous. Worse still, the question whether the plaintiff has *actually* pleaded that its rights in property were taken in violation of international law might never be answered. If, with its international-takings cause of action, the plaintiff joins other "garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution," *Simon*, 812 F.3d at 141, the Court could reach the merits on those claims without further considering whether there is any actual taking in violation of international law. This would render the expropriation exception a hollow and meaningless provision.

2. The ill fit of the court of appeals' standard is made even more apparent by comparing this case and *Simon*, 812 F.3d 127 The plaintiffs in this case

pleaded as a cause of action that their property was taken in violation of international law. J.A. 103-104. H&P-V alleged that "Venezuela has unreasonably discriminated against it on the basis of its sole shareholder's nationality," J.A. 180, and H&P-IDC alleged that Venezuela's expropriation of its subsidiary's property resulted in "a total loss of control over its subsidiary," J.A. 187. The court of appeals concluded that both plaintiffs had sufficiently pleaded jurisdiction under the expropriation exception because their pleadings were not wholly insubstantial or frivolous. J.A. 182, 187

The plaintiffs in *Simon* brought suit under the FSIA's expropriation exception against Hungary and its national railway for property losses during the Holocaust. 812 F.3d at 132. The district court dismissed the case for lack of subject-matter jurisdiction, *id.* at 134, and the D.C. Circuit reversed in relevant part, *id.* at 151. Even though the international-law violation in issue was "genocide," the court nevertheless concluded "there is no occasion to apply the 'exceptionally low bar' of non-frivolousness at the jurisdictional stage." *Id.* at 141. This was because, unlike in "prior cases," "the plaintiffs' claim on the merits [wa]s not an expropriation claim asserting a taking without just compensation in violation of international law"; instead, the plaintiffs sought "recovery based on garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution." *Id.* Because "the jurisdictional and merits inquiries do not overlap," the court required "more than merely a non-frivolous argument"; it "assess[ed] whether the plaintiffs' allegations satisfy the jurisdictional standard." *Id.*

In other words, in a case of *genocide*, where the plaintiffs happened not to plead a cause of action for a taking in violation of international law, the D.C. Circuit reviewed the pleadings using a standard "'similar to that of Rule 12(b)(6).'" *Id.* at 148 (citation omitted). Yet where plaintiffs allege mere discrimination, so long as they have pleaded an affirmative claim for a taking in violation of international law, their complaint will be dismissed only if the pleadings are "'wholly insubstantial or frivolous.'" J.A. 178 (citation omitted). The D.C. Circuit thus has provided a blueprint for future plaintiffs to avoid jurisdictional dismissals—and potentially the need to ever demonstrate an actual taking in violation of international-law. The plaintiffs need only recite the expropriation exception's statutory language as one of their causes of action.

This result is contrary to this Court's warning that the FSIA should not be construed to "allow plaintiffs to evade the Act's restrictions through artful pleading." *OBB Personenverkehr*, 136 S. Ct. at 396. It gives "jurisdictional significance to [a] feint of language" and allows the jurisdictional pleading standard under the expropriation exception to turn on "merely a semantic ploy." *Nelson*, 507 U.S. at 363. The D.C. Circuit's approach defeats the entire point of sovereign immunity, reducing the FSIA's jurisdictional limitations to "a useless drafting rule" that "is simple for plaintiffs to avoid." *Merrill Lynch*, 136 S. Ct. at 1574-1575.

3. Applying *Bell* to the FSIA's expropriation exception would also undermine the FSIA's purpose. Under the D.C. Circuit's rule, once the plaintiff passes the "exceptionally low" non-frivolousness hurdle, J.A. 178, the foreign state is immediately subject to

full-blown discovery and litigation on the merits. The *Bell* standard thus precludes a court from deciding as a jurisdictional matter whether a plaintiff has alleged an actual violation of international law, or whether actual property rights are in issue, before submitting the foreign state to the full burdens of merits litigation. This renders the presumption of immunity largely meaningless. As a result, the FSIA does little to give foreign states the "protection from the inconvenience of suit" to which the statute entitles them. *Dole Food*, 538 U.S. at 479.

This result cannot be squared with the historical context of the FSIA's enactment. Aside from codifying the "restrictive theory of sovereign immunity," which confers immunity on foreign states for "suits involving the foreign sovereign's public acts," the Act did nothing to *diminish* the immunity afforded to foreign states. *Verlinden*, 461 U.S. at 487, 488. To the contrary, "[a] foreign state is *normally immune* from the jurisdiction of federal and state courts, 28 U.S.C. § 1604, subject to a set of exceptions specified in [Sections] 1605 and 1607." *Id.* at 488 (emphasis added).

The court of appeals' rule, however, has the consequence of affording *less* protection to foreign states at the pleading stage than existed before the FSIA. This is because, in addition to requiring that "rights in property taken in violation of international law are in issue," the expropriation exception requires that there be a commercial nexus with the United States—a requirement independent of any cause of action a plaintiff might allege under the exception. 28 U.S.C. § 1605(a)(3); *see Agudas*, 528 F.3d at 941 (describing the nexus requirement as an independent jurisdictional prerequisite). There are often disputed

factual issues concerning the nexus prong. *See, e.g.*, *Fischer* v. *Magyar Allamvasutak Zrt.*, 777 F.3d 847, 854 (7th Cir. 2015) ("we remanded for jurisdictional discovery on whether the railway meets the nexus requirements"); *Abelesz*, 692 F.3d at 686 ("We thus remand that issue to the district court with instructions to allow jurisdictional discovery on the issue of the national railway's U.S. commercial activity."); *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019, 1024 (9th Cir. 2010) ("The district court allowed Cassirer to conduct jurisdictional discovery into the Foundation's commercial activity in the United States."). *Cf. Simon*, 812 F.3d at 147 (noting that the court was not foreclosing "any factual challenges by the Hungarian defendant" under the nexus requirement). And because the nexus requirement is jurisdictional, these issues must be resolved—often following jurisdictional discovery—before a court can proceed to the merits. *See Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998).

That would not have been the necessary result before the FSIA. Because foreign sovereign immunity was not jurisdictional, a court could have dismissed a case like this on the pleadings under Federal Rule of Civil Procedure 12(b)(6) for failure to state an international-takings claim. Not so now. Under the court of appeals' view, a plaintiff need only plead an international-takings claim that is not wholly insubstantial or frivolous to subject the foreign state to the burdens of jurisdictional discovery on the nexus requirement. Foreign states then must either litigate factual issues or abandon their factual jurisdictional challenges—even though the complaint on its face would be insufficient to establish jurisdiction had the

court decided whether rights in property taken in violation of international law were actually in issue. To quote the D.C. Circuit: "It would be bizarre if an assertion of immunity worked to increase litigation costs via jurisdictional discovery, to the neglect of swifter routes to dismissal." *In re Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998).

C. This Case Shows Why The Court Of Appeals' Standard Is Wrong.

The case offers a prime example why *Bell* should not govern courts' review of expropriation-exception pleadings. Despite the fact that the H&P plaintiffs failed to plead legally recognized property rights or a taking actually recognized as a violation of international law, the court of appeals allowed this case to go forward, and the district court compelled Venezuela to participate in discovery.

The court of appeals could have dismissed H&P-V's claim by applying the established, and bright-line, domestic-takings rule. Pursuant to that rule, "a foreign sovereign's expropriation of its own national's property does not violate international law." J.A. 179 (citing *United States* v. *Belmont*, 301 U.S. 324, 332 (1937)); *see also Case Concerning Barcelona Traction, Light & Power Co., Ltd. (New Application: 1962) (Belgium* v. *Spain), Judgment*, 1970 I.C.J. 3, 44 ¶ 78 (Feb. 5, 1970) (*Barcelona Traction*) (recognizing that a corporation has "no remedy in international law" against its state of incorporation, even if it believes its "rights are not adequately protected"); U.S. Cert.-Stage Br. 18-19 (acknowledging same). Instead, invoking a single pre-FSIA decision never before applied to the FSIA, *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *rev'd on*

other grounds, 376 U.S. 398 (1964), the court declined to dismiss. According to the court, *Sabbatino* showed that H&P-V's claim—that there was an exception to the domestic-takings rule when the taking is allegedly motivated by "discrimination" against the foreign parent of a domestic corporation—was not inescapably frivolous. J.A. 180.

The court of appeals also could have dismissed H&P-IDC's claim for damages resulting from the expropriation of its subsidiary H&P-V's property on the internationally recognized and bright-line principle that, "[s]o long as the company is in existence the shareholder has no right to the corporate assets." *Barcelona Traction*, 1970 I.C.J. at 34 ¶ 41; *see also Hausman* v. *Buckley*, 299 F.2d 696, 698 n.5 (2d Cir. 1962) ("under Venezuelan law stockholders have no right to enforce any claim in favor of their corporation against officers, directors, or third parties"); 9 William Meade Fletcher, *Fletcher on Corporations* § 4231, at 57 (rev. 2008) ("The corporation, and it alone, may sue to recover property of the corporation or to recover damages for injuries done to it."). But rather than apply that easily administrable rule, the court declined to dismiss H&P-IDC's claims, on the basis of a vacated due-process decision purporting to hold that "corporate ownership aside, shareholders may have rights in corporate property." J.A. 185 (discussing *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984), *cert. granted, judgment vacated on other grounds*, 471 U.S. 1113 (1985)). The end result: H&P-IDC was found to have put its rights in issue in a non-frivolous way because it had pleaded "a total loss of control over its subsidiary," J.A. 187—even though H&P-V continues to exist, is a

party to this case, and has asserted its own claims against PDVSA and Petróleo.

Finally, had the court of appeals dismissed the complaint on either of the above-identified purely legal grounds, the parties would not have had to litigate factual issues and discovery disputes. Following the court of appeals' remand to the district court, the H&P plaintiffs argued, for the most part successfully, that because Venezuela's "purely legal claims for dismissal based on sovereign immunity" had "been rejected," they were entitled to sweeping discovery from PDVSA and Petróleo concerning the factual bases for their threshold defenses. Pls.' Mem. of Points & Auths., Second Mot. to Compel 1, 11-cv-1735 Docket Entry No. 81 (Jan. 20, 2016). The H&P plaintiffs also asked the district court to compel the Republic to participate in discovery. *Id.* at 43-44. Again and again, the H&P plaintiffs repeated, this discovery was justified because of "the D.C. Circuit's refusal to dismiss the expropriation claims." *Id.* at 44.[3] The H&P plaintiffs' gambit largely worked. The

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[3] Plaintiffs' requests were sweeping, including but not limited to demands for "discovery regarding the PDVSA Defendants' purported legal rights, under Venezuelan law, over the expropriated property," Pls.' Mem. of Points & Auths., Second Mot. to Compel 2, 11-cv-1735 Docket Entry No. 81 (Jan. 20, 2016); "the PDVSA Defendants' exercise of power, influence, or practical control over the expropriated property," *id.* at 3; "the identity of the PDVSA officials who exercise influence over the expropriated property, minutes of board meetings that relate to the expropriated property, and documents and information relating to the PDVSA Defendants' influence or control over the expropriated property," *id.*; information on whether a non-party PDVSA-related entity "should be considered the agent or alter ego of the PDVSA Defendants," *id.* at 4; "documents relating to

district court granted the H&P plaintiffs' motion in part, ordered PDVSA and Petróleo to turn over a significant amount of discovery, and directed the Republic to participate in discovery as well. Order & Mem. Op., 11-cv-1735 Docket Entry Nos. 113, 114 (May 13, 2016). In other words, because the H&P plaintiffs pleaded a supposedly non-frivolous basis for jurisdiction under the expropriation exception, they were entitled to propound burdensome discovery requests on Venezuela. This is the inevitable result of the D.C. Circuit's unduly lax pleading standard, and it is among the many reasons why it should be rejected.

CONCLUSION

This Court has a "deeply felt and traditional reluctance *** to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 379 (1959). The court of appeals' incorporation of the *Bell* pleading standard into the expropriation exception is just that type of broad

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the acquisition, sale, transfer, or designation of any rights, privileges, duties, or obligations concerning the expropriated property," *id.* at 18; "information about the circumstances of" several non-party PDVSA-related entities' "creation" and "Venezuela's involvement in their creation," *id.* at 26-27; "the financial relationships among the entities," "periodic financial reports," and "financial statements," *id.* at 31-32; "information about financial support flowing between [a non-party PDVSA-related entity] and Venezuela," *id.* at 37; "discovery regarding Venezuela's involvement with the expropriated property," *id.* at 38; "communications from Venezuela concerning management/operation" of non-party PDVSA-related entities," *id.*; and "policies and procedures related to management" of those entities, *id.*

reading—and of a statute that Congress carefully calibrated to balance sensitive foreign-policy interests, no less. Under the correct pleading standard, this case should have been dismissed.

The decision below should be reversed. Alternatively, the judgment should be vacated and the case remanded with instructions that the court of appeals apply the correct standard.

Respectfully submitted,

JOSEPH D. PIZZURRO
ROBERT B. GARCÍA
KEVIN A. MEEHAN
JUAN O. PERLA
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178

BRUCE D. OAKLEY
Counsel of Record
HOGAN LOVELLS US LLP
700 Louisiana Street
Suite 4300
Houston, TX 77002
(713) 632-1400
bruce.oakley@hoganlovells.com

WILLIAM L. MONTS, III
CATHERINE E. STETSON
MARY HELEN WIMBERLY
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004

Counsel for Petitioners

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STATUTORY ADDENDUM

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which

the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen

only of the same State as the infant or incompetent.

* * *

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1391. Venue generally

* * *

(f) Civil actions against a foreign state—A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

* * *

28 U.S.C. § 1441. Removal of civil actions

* * *

(d) Actions against foreign States.—Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

* * *

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under

international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c)

and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an

agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign

state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which

maritime lien is based upon a commercial activity of the foreign state: Provided, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall

thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had

the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

(g) Limitation on discovery.—

(1) In general.—

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies

that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the

cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

28 U.S.C. § 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) In general.—

(1) No immunity.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft

sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) Claim heard.—The court shall hear a claim under this section if—

(A) (i) (I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of

terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to

arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) Limitations.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) Private right of action.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a) (1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) Additional damages.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) Special masters.—

(1) In general.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) Transfer of funds.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) Appeal.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) Property disposition.—

(1) In general.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) Notice.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) Enforceability.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) Definitions.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

28 U.S.C. § 1606. Extent of Liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like

circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C. § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign

state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United

States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal

receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall

not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having

determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f) (1) (A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22

U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2) (A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign

state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.—

(1) In general.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A,

and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under

section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.